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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

EDGAR REYES TREJO, an Incompetent Person, etc., Plaintiff and Appellant, v. DOE COMPANIES, Defendants and Respondents.	A148815 (Sonoma County Super. Ct. No. SCV254302)

This is an appeal from final judgment after the trial court granted the motion for summary judgment or, alternatively, summary adjudication in favor of defendants Burger King Corporation, Inc. (BK Corporation) and Strategic Restaurants Acquisition Company II, LLC (SRAC).[1] The trial court rendered this decision after finding the personal injury/product liability lawsuit brought on behalf of plaintiff Edgar Reyes Trejo by and through his wife and guardian ad litum, Patricia Lopez Reyes, was time-barred as a matter of law. The trial court further found, inter alia, that no triable issues of fact exist as to any legal duty owed by defendants, or any act or omission by defendants that proximately caused plaintiff's injuries.

Plaintiff contends on appeal the trial court's rulings are erroneous because the applicable two-year limitations period was subject to statutory tolling due to his mental

[1] Respondents Doe Companies include BK Corporation and SRAC (erroneously sued as Strategic Restaurants Acquisition Corp.), the latter of which was the franchisee, operator and owner of the Burger King establishment at which plaintiff alleges he consumed a contaminated hamburger in 2010.

incapacity (Civ. Proc. Code,, § 352, subd. (a)), and because triable issues of material fact exist as to whether a contaminated hamburger he consumed at an establishment owned or operated by defendants rendered him permanently disabled.

We agree this lawsuit is time-barred as a matter of law and, thus, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2010, plaintiff, a Mexican national with limited English skills, was living and supporting a family of five in Santa Rosa. At that time, plaintiff held several jobs, including providing janitorial services at a local Burger King franchise on Stony Point Road in Santa Rosa and buying and selling items at local flea markets. In mid-October 2010, plaintiff and his friend Sergio spent the morning working at a flea market. Around noon, the men went to a Santa Rosa Burger King franchise owned and operated by SRAC for lunch, where plaintiff ate a hamburger that he immediately noticed looked and tasted strange. Within a few hours of eating this burger, plaintiff became ill with nausea, fever, gastrointestinal pain and diarrhea. Nonetheless, plaintiff went to his janitorial job at about 10:00 p.m. at the Stony Point Road Burger King, still feeling quite ill.

Plaintiff's symptoms continued off and on for about 10 days to two weeks, until his wife finally took him to the emergency room for treatment on October 29, 2010, after he began to experience severe muscle weakness and impaired mobility. Plaintiff's wife reported at the hospital that plaintiff had become sick about "two to three weeks prior to admission," when he ate a hamburger he believed was contaminated. While some of his symptoms (including diarrhea) had abated since eating this hamburger, he had awoken the previous day with numbness and weakness in his legs, whole body pain, and respiratory problems.

Plaintiff was transferred to the Santa Rosa Memorial Hospital the next day (October 30, 2010), where medical reports indicate doctors initially suspected Guillain–Barré syndrome, of which "Campylobacter [an infectious process often linked to food consumption] has a well-known association . . . ." The report cautioned, however, that "now more than two weeks after the diarrheal illness he may no longer have Campylobacter in his stool." Other reports indicate "it was felt he did not have Guillain-

Barre but may have an infectious etiology for his ascending paralysis or some other etiology." Thus, without a definitive diagnosis, plaintiff was treated with a variety of strong antibiotics.[2]

Despite the hospital's medical care and treatment, plaintiff continued to experience "ascending paralysis," respiratory failure and other serious neurological complications. After prolonged hospital stays and rehabilitation efforts, plaintiff eventually settled at home in June 2011, where he remained confined to a wheelchair, unable to work, and in need of full-time assistance to provide for his daily needs. While plaintiff regained some of his cognitive skill, he continued to suffer from ongoing physical and mental complications as a result of his condition.

On September 17, 2013, nearly three years after plaintiff ate the allegedly contaminated hamburger and became ill, a complaint for personal injury damages was first filed by plaintiff's wife and guardian ad litum in Sonoma County Superior Court. An amended complaint (the operative pleading) was then filed on October 9, 2013, asserting causes of action for strict liability and negligence for placing an unsafe food product into the stream of commerce.

On May 24, 2016, following a contested hearing, the trial court granted summary judgment for defendants. In doing so, the trial court found the lawsuit was time-barred as a matter of law, and that plaintiff's asserted basis for tolling the limitations period—to wit, mental disability or incapacity pursuant to Code of Civil Procedure section 352, subdivision (a)—was inconsistent with the undisputed facts. Alternatively, the trial court found no triable issues of fact existed with respect to any legal duty owed by defendants to plaintiff, any act or omission by defendants that could have proximately caused plaintiff's injury or illness, the dangerousness or defectiveness of the subject hamburger

[2] The amended complaint alleged plaintiff's condition was identified as a Campylobacter infection, a food-borne illness he believed came from the subject hamburger, which was "complicated by a rare, debilitating and often fatal condition known as Guillian Barre Syndrome." However, plaintiff now admits no doctor or medical test ever confirmed he had Campylobacter.

(which was never tested), or as to defendant BK Corporation's vicarious liability for any act or omission of SRAC (given the franchisor's lack of control over the franchise's day-to-day operations). Accordingly, final judgment was entered in defendants' favor, prompting this appeal.

DISCUSSION

Plaintiff contends on appeal that the trial court erred in finding his personal injury lawsuit barred by the applicable two-year statute of limitations, reasoning that the running of this statutory period was tolled pursuant to Code of Civil Procedure section 352, subdivision (a) (section 352(a)) because he was mentally disabled or incapacitated at the time his cause of action accrued. Plaintiff further contends the trial court erred in dismissing his case without a trial to decide disputed issues of fact relating to whether his injury or illness was proximately caused by any breach of legal duty owed to him by one or both defendants. We address each argument to the extent appropriate below.

I. Statute of Limitations.

" 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] " 'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citation.]' [Citation.]" (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.)

" 'When there is no dispute over the decisive facts, the question of limitations is one of law, amenable to disposition by summary judgment. [Citations.]' (*Wells Fargo Bank v. Superior Court* (1977) 74 Cal.App.3d 890, 895 [141 Cal.Rptr. 836].)" (*Feeley v. Southern Pacific Transportation Co.* (1991) 234 Cal.App.3d 949, 951 (*Feeley*).)

On September 17, 2013, this product liability/personal injury action was initially filed by plaintiff by and through his wife and guardian ad litum. The prescribed

limitations period for this type of action is two years. (Code Civ. Proc., § 335.1.) In deciding whether plaintiff complied with this statute, the following principles are relevant.

"Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 806–807 (*Fox*).) There are, however, exceptions to this rule. Here, for example, plaintiff acknowledges filing this lawsuit in September 2013, well over two years after he ate the allegedly contaminated hamburger in October 2010. He contends, however, the two-year statutory limitations period was tolled pursuant to section 352(a), which until 2014 provided in relevant part: "If a person entitled to bring an action . . . is, at the time the cause of action accrued . . . insane, the time of the disability is not part of the time limited for the commencement of the action."[3] (Former § 352, subd. (a), amended by Stats. 1994, ch. 1083, § 4, pp. 6466–6467.) "[I]nsane" for purposes of section 352 means the individual is "incapable of caring for his property or transacting business, or understanding the nature or effects of his acts." (*Hsu v. Mt. Zion Hosp*. (1968) 259 Cal.App.2d 562, 571; *Feeley, supra,* 234 Cal.App.3d at pp. 951–952 ["A finding that a person was 'incapable of caring for his [or her] property or transacting business or understanding the nature or effects of his [or her] acts, [is] equivalent to a finding in express terms that [he or she] was insane within the meaning of the statute of limitations' "].) Moreover, the alleged disability must have "existed when [the] right of action accrued" (§ 357; accord, *Bennett v. Shahhal* (1999) 75 Cal.App.4th 384, 392).

Below, the trial court rejected plaintiff's tolling argument, finding by undisputed evidence that the alleged mental disability that rendered him legally incapacitated did not

[3] In 2014, section 352(a) was amended to replace the term "insane" with "lacking the legal capacity to make decisions." (Stats. 2014, ch. 144, § 4, No. 2 West's Cal. Legis. Service, p. 2125, eff. Jan. 1, 2015.) When this amendment was made, the legislative history noted that the change was non-substantive in nature, intended to replace "certain offensive and outdated terms once used to describe mental health conditions" with "current, less offensive, terms." (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1847 (2013–2014 Reg. Sess.) as amended Apr. 22, 2014, p. 1.)

arise until approximately two weeks after he ate the allegedly tainted hamburger, the date, according to the pleadings, that his legal claim accrued. Accordingly, the trial court concluded, plaintiff could not avail himself of the tolling afforded under section 352(a). We agree.

While plaintiff alleges some facts that suggest, from the time he ate the hamburger, he was incapable of caring for his property or transacting business or understanding the nature or effects of his acts (due mainly to poor education, lack of cultural assimilation and lack of English language skills), the undisputed facts presented to the trial court on summary judgment establish he was not legally and/or mentally incapacitated. These undisputed facts are as follows. Plaintiff first fell ill in mid-October 2010, about two weeks before his admission to the Sutter hospital emergency room. At the time, plaintiff told his friend Sergio the hamburger he was eating for lunch looked "ugly" and tasted strange. Consistent with this, plaintiff later told his wife that he believed the hamburger he had eaten earlier in the day had sickened him.

Also undisputed is the fact that, from the day he ate the subject hamburger, plaintiff experienced off and on physical symptoms commonly associated with food-borne illness, which include fever, vomiting, and diarrhea. He did not, however, exhibit any signs of mental illness or incapacity, a fact adamantly confirmed by both plaintiff and his wife in their respective deposition testimony and set forth in plaintiff's verified interrogatory answers. In particular, plaintiff and his wife confirmed that, for the approximate two-week period between his consumption of the hamburger in mid-October until his hospital admission on October 29, 2010, he was "clear of the mind," was mentally alert, had no difficulty speaking, and could generally make his own decisions and care for his own needs. Further, plaintiff's own Separate Statement of Undisputed Material Facts in Opposition to Defendants['] Motion for Summary Judgment or Alternatively Summary Adjudication (SSUMF) and Response to the SSUMF filed by defendants consistently identify the date plaintiff consumed the subject hamburger as "mid-October 2010, around 11:30 a.m. to noon," and consistently identify the time gap

between the onset of physical symptoms and his admission to the hospital on October 29, 2010, as "approximately two weeks" or "approximately 10 days–two weeks."

Thus, while the record as a whole reflects that plaintiff lost his ability to work and otherwise provide for and care for his family and himself after eating the subject hamburger, the record of significance to our resolution of this appeal reflects that he formed, and clearly communicated to others, a reasonably founded suspicion that the hamburger he ate on or about October 15, 2010, was unsafe and made him physically sick within hours of eating it; and that he maintained this clear thinking and communicating until the time he was hospitalized. These facts undermine plaintiff's position that his cause of action did not accrue immediately upon his consumption of the allegedly tainted hamburger, notwithstanding his level of education or English language ability. (See *Sanchez v. South Hoover Hosp*. (1976) 18 Cal.3d 93, 102 ["sections 352 and 354 describe the particular personal disabilities which will toll the statute of limitations. These statutory conditions have been held to be exclusive, and they do not include either physical debility or hospital confinement"]; *Baker v. Beech Aircraft Corp*. (1974) 39 Cal.App.3d 315, 322 "section 352 . . . sets forth a list of the disabilities which will toll the statute of limitations. Mere physical disability or nervous shock following an accident are not included in that list"].)

We further note that, at some point during the discovery process, plaintiff appears to have changed his response as to *when* he consumed the allegedly contaminated burger, from around noon in mid-October 2010 to around noon on October 27, 2010. The effect of this change would be to eliminate the 10-day to two-week gap between when plaintiff became physically ill after eating the subject hamburger and his admission to the hospital with symptoms that included significant cognitive impairment. Then, all his visible symptoms, physical as well as mental, could be deemed to have arisen simultaneously (arguably triggering section 352).

We reject plaintiff's revisionism. Aside from plaintiff's incongruent responses late in the discovery process (specifically, plaintiff's Supplemental Answers to Defendants Second Set, and Answers to Defendants Third Set, of Special

Interrogatories), the factual record, including plaintiff's SSUMF and Response to the SSUMF filed by defendants, are consistent: Plaintiff, after eating the allegedly contaminated hamburger, suffered off and on from diarrhea, fever, abdominal cramping and the like "for almost two weeks" until his wife finally took him to the hospital due to his worsening condition on October 29, 2010 (a fact confirmed by medical records). (See *Cheviot Vista Homeowners Assn. v. State Farm Fire & Casualty Co.* (2006) 143 Cal.App.4th 1486, 1499, fn. 8 ["It is axiomatic that in 'reviewing a motion for summary judgment, the relevant facts are limited to those set forth in the parties' statements of undisputed facts, supported by affidavits and declarations, filed in support of and opposition to the motion in the present case, to the extent those facts have evidentiary support' "].)

In a similar vein, plaintiff points on appeal to numerous instances in his and his wife's depositions when they claim not to know the answer to specific questions regarding when he ate the subject hamburger, when he became mentally impaired, and when he went to the hospital. For example, plaintiff answered "I don't remember" or "I don't know" to questions about when he first experienced "any mental impairment" and whether he had any difficulty managing his affairs, assessing his own needs or understanding the nature of his actions from the time he ate the hamburger until the time he was hospitalized. However, notwithstanding these non- or evasive deposition answers, there are many examples in the record, including elsewhere in their depositions and in plaintiff's SSUMF, of his or his wife's clear denial that he lacked the ability to "think more clearly" during this 10-day to two-week time frame. While plaintiff now insists he lacked the cognitive ability during his deposition to provide truthful answers, plaintiff fails to offer any ground or evidence that would require us to reject his prior affirmative sworn testimony. In particular, plaintiff's reliance on information regarding his cognitive ability (or lack thereof) contained within the reports of his two medical experts, Drs. H. Hull and E. Angelone, is misplaced given the trial court's ruling below to

exclude this evidence from the record, a ruling plaintiff does not directly challenge here.[4] "[A]s in summary judgment proceedings generally, [a plaintiff] cannot manufacture a dispute on summary judgment, ipse dixit, by refusing to concede the truth of a fact without adducing some evidentiary support for its position." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 301.)

Finally, in briefing, plaintiff suggests another basis for tolling the limitations period—to wit, the delayed discovery rule, arguing: "Edgar could have no possible way to know that his early sickness would not pass, and that another unknown process was going on that would destroy his motor nerves, and would make him a cripple for life." As we will explain, plaintiff's alternative argument likewise fails.

"An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Fox, supra*, 35 Cal.4th at p. 807.) However, to rely on the discovery rule to toll the statute of limitations, the "plaintiff . . . must plead ' "(1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." ' [Citation.]" (*WA Southwest 2, LLC v. First American Title Ins.*

[4] As mentioned above, plaintiff relies in briefing on the reports offered by his medical experts, Drs. H. Hull and E. Angelone, who opine (among other things) that plaintiff was legally incapacitated "at least since approximately [the] later part of October 2010" (Angelone), and that he developed a gastrointestinal infection after eating the subject hamburger compatible with Campylobacteriosis that "more likely than not" led to Guillain-Barré syndrome (Hull). The trial court sustained defendants' objections to this evidence and, while plaintiff claims in briefing this evidence is admissible, plaintiff never challenged the trial court's ruling below and does not properly challenge it here. It is well established that plaintiff, as the aggrieved party, had the burden to challenge the court's ruling below, as well as the burden before this court to affirmatively challenge the ruling as a distinct assignment of error with a separate argument heading or analysis identifying the specific manner in which the trial court abused its discretion in excluding his evidence. Having failed to do so, plaintiff has not preserved this issue for appeal. (*Roe v. McDonald's Corp*. (2005) 129 Cal.App.4th 1107, 1114 [plaintiff failed her burden on appeal to affirmatively challenge the trial court's evidentiary ruling, and to demonstrate the court's error, where "[h]er brief on appeal fail[ed] to identify the court's evidentiary ruling as a distinct assignment of error, and there is no separate argument heading or analysis of the issue. That alone is grounds to deem the argument waived"].)

Co. (2015) 240 Cal.App.4th 148, 157 (*WA Southwest 2*) ["Plaintiffs have an obligation to plead facts demonstrating reasonable diligence"]. As the California Supreme Court explains, "In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, *despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period*." (*Fox, supra*, 35 Cal.4th at p. 809, italics added.) The reason for this requirement is this: "The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ' " ' information of circumstances to put [them] *on inquiry*' " ' or if they have ' " '*the opportunity to obtain knowledge* from sources open to [their] investigation.' " ' [Citations.] In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Id.* at pp. 807–808, fn. omitted.)

Here, in the operative complaint, plaintiff alleged he "was in such a physical and mental state, and so handicapped, and so cognitively disconnected, and so unable to communicate or appreciate his own situation, that *he was protected by [section] 352* and other California statutory and case law," until "realistically . . . after [he] was first able to be in touch with and talk to an attorney, which was on or about June 11, 2013." Elsewhere in this pleading, plaintiff adds: "Plaintiff suffers from extreme mental incompetency and cognitive disabilities; severe language difficulties; cannot speak any English; cannot communicate effectively even in his own native language; nor process information; nor look after nor manage his own affairs; nor is now fully and sufficiently aware of the nature and effect of his acts; and incapable of caring for his property; nor able, without outside and professional assistance, to take any steps to protect his own interests or those of his family. All of these conditions, or the origins thereof, arose contemporaneously with his injury and what would have been the accrual of his cause of action . . . ." As these excerpts reflect, plaintiff did not appropriately plead delayed discovery as an alternative basis for tolling in the operative complaint, as there are no

allegations that he conducted a diligent investigation of the circumstances of his injury, and yet, despite doing so, could not have reasonably discovered facts supporting his cause of action. "If a plaintiff wishes to expand the issues presented, it is incumbent on the plaintiff to seek leave to amend the complaint either prior to the hearing on the motion for summary judgment, or at the hearing itself." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Scalf v. D .B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519 [" ' "*The pleadings define the issues to be considered on a motion for summary judgment*," ' " italics added].)

Moreover, and in any event, plaintiff's argument—that he could have had no way of knowing his food-poisoning-like illness would not pass—misses the point. Under California law, " 'when the fact of injury and the identity of the party responsible for it are known, the failure to discover some or most of the resulting damage until later will not toll the running of the statute.' " (*Warrington v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 564, 567; see also *WA Southwest 2*, *supra*, 240 Cal.App.4th at p. 156; accord, *Spellis v. Lawn* (1988) 200 Cal.App.3d 1075, 1080 ["For the discovery rule to come into play, the cause of action itself must lie unsuspected"].)[5]

[5] At oral argument, the parties discussed with this court the relevance of the "delayed discovery rule" to the issue of whether the statute of limitations bars this action. More specifically, we considered the application of this rule in light of the fact that plaintiff experienced distinct symptoms that manifested at different times—first, abdominal and digestive-type symptoms (including nausea and diarrhea) and later, significantly more serious respiratory and neurological symptoms (including paralysis). We invited supplemental briefing on the issue, and the parties complied. In this briefing, the parties referenced a line of so-called "latent disease cases," in which the California Supreme Court held that, when a later-discovered disease is "separate and distinct" from an earlier-discovered disease, "the statute of limitations bar can apply to one disease without applying to the other." (*Pooshs v. Philip Morris U.S.A., Inc.* (2011) 51 Cal.4th 788, 802; see also *Grisham v. Philip Morris U.S.A., Inc*. (2007) 40 Cal.4th 623, 645.) According to defendants, plaintiff cannot rely on this line of cases because, one, he failed to raise this issue before the trial court and therefore forfeited the right to do so here and, two, his case is factually distinguishable. We agree with defendants in both regards. It is well established that a party attempting to avoid summary judgment cannot raise an issue for the first time on appeal. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28–29.) Moreover, even were we to excuse plaintiff's

Thus, in conclusion, we acknowledge the well-founded rule that " '[a]ll doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment.' [Citation.]" (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757.) This rule supports the vital policy of favoring disposition of cases on the merits rather than on procedural grounds. (*Fox, supra,* 35 Cal.4th at p. 806.) Yet, at the same time, significant policies underlie our statutes of limitations, including the laudable goal of "giv[ing] defendants reasonable repose, thereby protecting parties from 'defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation may present unfair handicaps.' [Citations.] A statute of limitations also stimulates plaintiffs to pursue their claims diligently." (*Ibid.*) And, in this case, where the evidence does not suffice to establish any triable issue of fact as to plaintiff's lack of mental or legal capacity at the time he first suspected that he had been sickened by a contaminated hamburger that would delay the accrual of his action, the policies underlying our statutes of limitations must prevail. The law is clear that " '[n]o person can avail himself of a disability, unless it existed when his right of action accrued.' (§ 357.)" (*Bennett v. Shahhal, supra,* 75 Cal.App.4th at p. 392 [plaintiff failed to establish the existence of any mental disability for purposes of section 352 where his own declaration established that his "insanity" began after his action accrued].)

Accordingly, under the facts as correctly found undisputed by the trial court, plaintiff had suffered actual and appreciable harm from defendants' alleged placement into the stream of commerce of the allegedly unsafe hamburger by the middle of October 2010, thereby triggering the running of the two-year statutory period. Neither

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forfeiture, we would nonetheless find the aforementioned latent disease cases inapposite. The record in this case reflects that plaintiff has consistently asserted there is a causal link between his initial injury (Campylobacter infection from the hamburger) and his subsequent illness and symptoms (Guillain-Barré syndrome), including in his SSUMF, where he asserts "it is more likely than not that as a result of this campylobacter infection, [he] was stricken with GBS," and that there is "a known and demonstrated link between campylobacter and the onset of GBS." Accordingly, plaintiff's reliance on this line of cases is misplaced.

plaintiff's ignorance of the true extent of his injury or illness nor the onset of his cognitive impairment on or about October 29, 2013, suffices under California law to delay the running of this limitation period. As such, his lawsuit is time-barred. While we recognize food poisoning cases are exceptionally difficult to prove because, as here, the suspect food has long been ingested and thus usually cannot be tested, under California law such cases are not exempt from otherwise universal legal rules, including those governing statutes of limitations and tolling. (See *Minder v. Cielito Lindo Restaurant* (1977) 67 Cal.App.3d 1003, 1008 ["like any other personal injury action the plaintiff must prove that the food was unwholesome or unfit and caused his illness"].)

II. Lack of Other Triable Issues of Fact.

Lastly, because we, like the trial court, conclude this action is time-barred as a matter of law, we need not address the court's alternative findings in granting summary judgment, that no triable issues of fact exist with respect to other essential elements of plaintiff's personal injury claim, including whether a legal duty existed on behalf of defendants or whether BK Corporation may be held vicariously liable for the acts or omissions of its franchisee. The judgment must be affirmed for lack of timeliness.

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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Siggins, P. J.

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Pollak, J.*

* On Monday, November 26, 2018, the Commission on Judicial Appointments confirmed the Governor's appointment of Justice Pollak as the Presiding Justice of Division Four of this court.